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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. TOM JON RILURCASA, Defendant and Appellant.	2d Crim. No. B234195 (Super. Ct. No. 1348503) (Santa Barbara County)

Tom Jon Rilurcasa was convicted by jury of two counts of oral copulation by force (counts 1 & 3; Pen. Code, § 288a, subd. (c)(2))[1], forcible lewd act upon a child (count 2; § 288, subd. (b)(1)), assault (count 4; § 240), unlawful contact with a child with intent to commit a sexual crime (count 5; § 288.3), and attempted oral copulation on a person under 16 years of age (count 6; §§ 664/288a, subd. (c)(2)). The trial court sentenced him to 18 years, 8 months state prison. On appeal, appellant argues that there was insufficient evidence of "force" to support the convictions for forcible lewd conduct and oral copulation by force. We affirm.

Facts

Jane Doe, born June 9 1996, was a family friend or distant relative and frequently visited appellant's house in Santa Maria.

[1] All statutory references are to the Penal Code unless otherwise stated.

Counts 1 & 2 –Oral Copulation by Force and Forcible Lewd Conduct

When Jane was seven, appellant said he would take her to the Boomer's arcade if she went to a playroom in the house and had intercourse with him. Appellant led Jane to the playroom and closed and locked the door.

Appellant positioned Jane in the far corner of the room next to a window and pulled down her skirt and underwear. After appellant looked outside to make sure no one was nearby, he laid Jane down, spread her legs, and licked her vagina for ten minutes. Jane was scared and wanted to hide in the closet.

Appellant looked out the window again, pulled down his pants, and rubbed his penis on Jane's vagina for about 10 minutes. Jane was scared and felt sick. Appellant warned Jane not to tell anyone and said she would be "in very big trouble" if she said anything.

Count 3 – Oral Copulation by Force

On another occasion, Jane and four-year old Erica were watching a Tarzan movie in appellant's bedroom. Appellant entered the room, closed the door, laid Jane on her back, and pulled down her shorts and underwear. Appellant spread Jane's legs and licked her vagina as Erica watched television. Jane felt ill and was too afraid to say anything to alert Erica. Appellant warned Jane not to tell anyone, especially her mom.

Count 4 - Assault

A few days later, Jane was at the house and made an imaginary fort out of blankets. Appellant waived a condom at her and said he wanted to put it on his penis. Jane was disgusted and used a stool to block appellant's entrance into the fort. Appellant offered to take her swimming if she went to the playroom with him. Jane loved to swim but said "No." Appellant told Jane not to say anything.

After Jane moved to Santa Rosa, she told a school counselor about the sexual abuse. The matter was referred to Santa Maria Police Department Detective Paul Vanmeel who had Jane make a pretext call on June 16, 2010.

Jane called appellant and said that she was 14 years old, that she was in town visiting, and that she was sexually active. Appellant talked about orally copulating

Jane when she was seven years old and how he put "his finger in her pussy." Appellant said he wanted to meet with her and that he had a condom for her. Jane asked what he was going to do with the condom; appellant replied that he was going to have intercourse with Jane.

Jane ended the call, called back a few minutes later, and said she would meet appellant at Waller Park at noon. Officers observed appellant drive to the park and arrested him. Appellant had four condoms in his pocket and said that Jane "shouldn't have called him." On the way to the police station, appellant wondered aloud how Jane got his phone number.

Before trial, appellant told his cell mate, Leonel Acosta, that he molested a seven-year-old "cousin" from 2002 to 2004. Appellant said that he tried to penetrate her vagina with two fingers and that the victim "came on to him." Acosta protested "She's too young to even know what sex is." Appellant agreed and said that the sexual contact ended in 2004 after the cousin moved.

Sufficiency of Evidence: Force

Appellant argues there is insufficient evidence of force to sustain the conviction for oral copulation by force (counts 1 and 3) and forcible lewd act on a minor (count 2). As in any sufficiency of the evidence appeal, we review the record in the light most favorable to the judgment and presume the existence of every fact the jury could reasonably deduce from the evidence in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The trial court instructed that, in order to convict for oral copulation by force and forcible lewd act on a child, the prosecution had to prove that appellant accomplished the acts "by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone." (CALCRIM 1015, 1111.) The prosecution, at the end of the trial, conceded that force, violence, menace, or threat of immediate bodily injury were not present, but argued that the sexual acts were accomplished by fear and duress.

Appellant argues that he did not use physical force substantially different from or in excess of that necessary to accomplish the sex acts. (See *People v. Senior* (1992) 3 Cal.App. 4th 765, 774.) But this is a non-issue because physical force and duress (i.e. psychological coercion) are not the same.[2] The prosecution's case was based on duress which "is a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted. [Citation.]" (*People v. Leal* (2004) 33 Cal.4th 999, 1004.)

Stated another way, duress is psychological coercion. "The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of her age and relationship to the defendant." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14.)

Appellant argues that psychological coercion without more does not establish duress and, at a minimum there must be a direct or implied threat. (See *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1250-1251; *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321.) In *Espinoza* defendant molested his 12-year-old daughter but "[n]o evidence was adduced that [the] defendant's lewd act and attempt at intercourse were accompanied by any 'direct or implied threat' of any kind. While it was clear that [the victim] was afraid of the defendant, no evidence was introduced to show that this fear was based on anything [the] defendant had done other than to continue to molest her." (*Ibid.*)

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[2] "There is some overlap between what constitutes duress and what constitutes force. This is because duress is often associated with the use of physical force, which may, but need not be present to have duress. . . . [F]orce, as used in the content of section 288, subdivision (b), refers to physical force. To extend the meaning of that word to cover psychological coercion would be tantamount to rendering the word 'duress' meaningless in that statute." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50, fn. 9.)

Espinoza is distinguishable because the victim (age 12) was considerably older than Jane. As a seven year old, Jane was more susceptible to being coerced based on appellant's age (17), size, frequent family contact, and position of authority. (See e.g., *People v. Veale* (2008) 160 Cal.App.4th 40, 49-50.) Our courts have distinguished *Espinoza* where the victim is only seven or eight years old (*Ibid.; People v. Pitmon, supra,* 170 Cal.App.3d at p. 51 [eight-year-old victim]) or there is a large discrepancy between the age of the defendant and the victim (*Ibid.*; *People v. Cochran, supra,* 103 Cal.App.4th at pp. 14- 15; *People v. Pitmon, supra,* 170 Cal.App.3d at p. 51.)

A rational trier of fact can find duress where there is an "inherent imbalance of power in an encounter between a child and an adult bent on sexual conduct." (*People v. Soto* (2011) 51 Cal.4th 229, 245-246.) For example, in *People v. Bergschneider* (1989) 211 Cal.App.3d 144, defendant forced his 14-year-old, "slightly mentally retarded" stepdaughter to have sex with him, in part by threatening to put her "on restriction" if she refused, which meant that "she couldn't go anywhere or spend the night with anyone." (*Id*., at p. 150, fn. 3.) The Court of Appeal held: "The threatened restriction constitutes 'hardship or retribution' within the meaning of *Pitmon.* It was for the jury to determine whether a reasonable adolescent in [the victim's] position would have been coerced." (*Id*., at p. 154.)

Appellant promised to take Jane to Boomer's arcade if she went to the playroom and had sexual intercourse with him. Although bribery is not "force," it was an enticement to lure Jane to the empty playroom. Appellant closed and locked the door, laid Jane down on her back, removed her underclothing, engaged in sexual acts while Jane experienced fear and nausea, and warned Jane that she would be in big trouble if she told anyone. It was duress and had all the elements of an implied threat, fear, hardship, and retribution. (See *People v. Leal*, *supra*,33 Cal.4th at pp. 1009-1010.)

Count 3 for oral copulation by force occurred in appellant's bedroom while Jane's four-year-old friend (Erica) watched a movie. Appellant closed the door, pulled down Jane's shorts and underwear, and licked her vagina. Jane was too scared to resist or

alert Erica. Appellant warned Jane not to tell anyone, especially her mom.[3] Duress was established by the disparity in size and age of appellant (age 17) and Jane (age 7) (*People v. Veale, supra,* 160 Cal.App.4th at p. 48; *People v. Cochran, supra,* 103 Cal.App.4th at p. 15; *People v. Pitmon, supra,* 170 Cal.App.3d at p. 51), by the long and trusting relationship, by appellant's use of an isolated place (his bedroom with the door closed), and appellant's warning not to tell anyone. (*People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, 238-239.) "A simple warning to a child not to report a molestation reasonably implied the child should not otherwise protest or resist the sexual imposition." (*People v. Senior, supra,* 3 Cal.App.4th at p. 775.)

Substantial evidence supports the finding that appellant committed the charged offenses by duress and/or fear. " 'The record paints a picture of a small, vulnerable and isolated child who engaged in sex acts only in response to [appellant's frequent contact with the family] and physical authority. Her compliance was derived from intimidating and the psychological control he exercised over her and was not the result of freely given consent.' [Citation.]" (*People v. Veale, supra,* 160 Cal.App.4th at p. 48.)

Cross-Examination of Acosta

Appellant claims that the trial court violated his right to confront and cross-examine the jail house informant, Leonel Acosta, about the underlying facts of the sex offense (unlawful intercourse with a 14-year old more than three years younger than Acosta; § 261.5, subd. (c)) on which he was convicted by plea and to be sentenced. The trial court ruled that defense counsel could cross-examine Acosta about the conviction and the age difference of the victim but no more.

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[3] On count 4 for attempted forcible oral copulation, appellant showed Jane a condom and promised to take her swimming if she went to the playroom with him. It was enticement but not duress. Jane said "No" and blocked appellant's entry into the imaginary blanket fort. There was no force, implied threat, or duress. The jury convicted appellant of misdemeanor assault, a lesser included offense.

Citing *People v. Wheeler* (1992) 4 Cal.4th 284, appellant argued that he was entitled to impeach Acosta about any conduct involving moral turpitude. Defense counsel argued that the court's ruling "sanitizes" Acosta because the prosecution was giving Acosta a two year sentence "and wants 17-plus on my client."

The trial court did not err in limiting the cross-examination. Evidence Code section 352 "empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler, supra*, 4 Cal.4th at p. 296.) The holding in *People v. Wheeler* is "a narrow one" and states that where a witness *denies having committed a misdemeanor consisting of moral turpitude*, he or she may only be impeached by evidence of the underlying conduct of that misdemeanor. (*Id*., at p. 300, fn. 13.) The right to cross-examine and impeach a witness about *a prior felony conviction* does not extend to the facts of the underlying offense. (See Evid. Code, §§ 786-787; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1267; *People v. Heckathorne* (1988) 202 Cal.App.3d 458, 462.)

"[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination. . . ." (*People v. Frye* (1998) 18 Cal.4th 894, 946.) "Unless the defendant can show the prohibited cross-examination would have produced 'a significantly different impression of [the witness'] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]" (*Ibid.; Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674, 684].)

The alleged error in limiting the cross-examination of Acosta was harmless beyond a reasonable doubt. Acosta was impeached based on his prior convictions (receiving stolen property, false identification to an officer, spousal battery, and statutory rape) and the lenient sentence he was about to receive for testifying against appellant. At the close of the case, appellant told the jury that Acosta was not credible and that Acosta's testimony "was bought and paid for [by the prosecution]. They were willing to dance with the devil, and they bought and paid for that testimony." The jury was

instructed that the testimony of an in-custody informant should be viewed with caution and close scrutiny. (CALCRIM 336.)

Even without Acosta's testimony, the evidence was overwhelming. Jane's account of the sexual assaults was corroborated by her statements to the police and appellant's damning statement in the pretext call.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Patricia L. Kelly, Judge

Superior Court County of Santa Barbara

Gilbert W. Lentz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen, Supervising Deputy Attorney General, Dana M. Ali, Deputy Attorney General, for Plaintiff and Respondent.